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No.

IN THE
Supreme Court of the United States
OCTOBER TERM, 1983

U. S. ELECTRICAL MOTORS,
A DIVISION OF EMERSON ELECTRIC CO.,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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Electric Co.

**Counsel of record*

QUESTION PRESENTED

Whether the Courts of Appeals have jurisdiction to review an order of the National Labor Relations Board setting aside a contested representation election and ordering a second election, when said order is based upon identical conduct found to be unfair labor practices by the Board, and where the Board's unfair labor practice order is before the Courts of Appeals upon either a Petition for Review or a Petition for Enforcement?

CORPORATION LIST

Petitioner, U.S. Electrical Motors, is a Division of Emerson Electric Company.

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28 U.S.C. §1245(1) 2

National Labor Relations Act, as amended, 29 U.S.C. §§151 *et seq.*:

§8(a)(1) 3
§8(a)(5) 10
§9(d) 7
§10(f) 4, 7

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NATIONAL LABOR RELATIONS BOARD,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Petitioner, U.S. Electrical Motors, a Division of Emerson Electric Co. (hereinafter "Petitioner," "the Company," or "the Employer") respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit entered in this case.

OPINION BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit herein is reported at 722 F.2d 315 (6th Cir. 1983), and is reproduced in the separately bound appendix (hereinafter "App.") at pp. 1a - 12a. The decision of the National Labor Relations Board (hereinafter 'NLRB" or "the Board") is reported at 261 NLRB 1343 (1982) and is reproduced at App. 13a - 60a.

JURISDICTION

The judgment of the Court of Appeals for the Sixth Circuit was entered on December 9, 1983. App. 1a. On February 17, 1984, Justice O'Connor entered an order extending the time in which to file a petition for a writ of certiorari to and including April 7, 1984. This Court's jurisdiction is invoked pursuant to 28 U.S.C. §1254(1).

STATEMENT OF THE CASE

On July 26, 1978,[1] the International Association of Machinists and Aerospace Workers, AFL-CIO (hereinafter "the Union") filed a petition with the 26th Region of the Board for a representation election among employees at the Employer's Mena, Arkansas plant. The election was conducted on October 6, in which the Union failed to receive a majority of the valid ballots cast.[2] Thereafter, the Union filed both an unfair labor practice charge and objections to the election. The substantive allegations in both the charge and the objections were identical, and both matters were consolidated by the Board's Regional Director for a hearing before the Board's Administrative Law Judge (hereinafter "ALJ"). App. 25a - 26a.

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[1]All dates hereinafter are 1978 unless otherwise indicated.

[2]There were 200 votes for the Union, 213 for the Company, and nine challenged ballots. Said challenges were insufficient in number to affect the results of the election. App. 25a.

In his decision of January 22, 1981, the ALJ found that the Union and the Board's General Counsel failed to establish that the Employer had committed certain acts alleged to be both unfair labor practices and objectionable conduct. However, the ALJ also found that the Employer had coercively interrogated and threatened employees in other respects, and had verbally promulgated an overly broad no-solicitation rule. The ALJ concluded that these acts of the Employer violated §8(a)(1) of the National Labor Relations Act (hereinafter "the Act"), as amended, 29 U.S.C. §158(a)(1), and also interfered with the election. The ALJ ordered the Company to cease and desist from the unfair labor practices found, and he set aside the results of the October 6 election and ordered that the Regional Director conduct a second election. App. 56a.

Subsequent to the ALJ's decision, the Company filed exceptions with the Board. In its May 28, 1982, Decision, Order, and Direction of Second Election,[3] the Board reversed certain of the ALJ's findings that the Employer had violated §8(a)(1) and committed objectionable conduct. However, the Board affirmed the ALJ's decision with respect to his other findings, set aside the results of the election, directed a second election, and ordered the Company to post a Notice to Employees regarding said unfair labor practices. App. 18a - 21a.

Thereafter, the Company filed a Petition for Review with the United States Court of Appeals for the Sixth Circuit. In addition to its contentions that the Board's findings below were not supported by substantial evidence, the Company argued that, under controlling Sixth Circuit precedent,[4] the court also had jurisdiction to review the Board's order directing a second election. The court, however, rejected the Employer's contentions, enforced the Board's §8(a)(1) findings, and concluded

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[3]261 NLRB 1343 (1982). App. 13a - 23a. The Board's panel consisted of Members Fanning, Jenkins, and Zimmerman. App. 21a.

[4]*Maremont Corp. v. NLRB*, 666 F.2d 1037 (6th Cir. 1981).

that "the direction of an election by the Board is not a 'final order' within the meaning of Section 10(f), 29 U.S.C. §160(f), and not subject to review." App. 9a. The court held further that the Board's order directing a second election "can only be challenged in the context of the Company's later refusal to bargain because of the asserted error in the Board's order." App. 9a.

REASONS FOR GRANTING THE WRIT

A. *The Court Of Appeals Decided An Important Question Of Federal Law Which Has Not Been, But Should Be, Settled By This Court*

Shortly after passage of the Act, this Court spoke on the issue of the jurisdiction of the Courts of Appeals to review orders of the Board directing *initial* elections. Thus, in *American Federation of Labor v. NLRB*, 308 U.S. 401 (1940), the Court held that §10(f) of the Act, 29 U.S.C. §160(f)[5] only provided for appellate review of a "final order" of the Board. In holding that the Board's direction of an initial election was not a "final order"[6] the Court relied, *inter alia*, upon the legislative history of the Wagner Act. Thus, the Court found:

> [The Act] provides for review in the courts only after the election has been held and the Board has ordered the employer to do something predicated upon the results of an election. 79 Cong. Rec. 7658. *Id.* at 411.

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[5] 29 U.S.C. §160(f) provides in relevant part:

> (f) Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any circuit court of appeals of the United States in the circuit wherein the unfair labor practice in question was alleged to have been engaged in. . . . The Court . . . shall have the same jurisdiction . . . to make and enter a decree . . . setting aside in whole or in part the order of the Board. . . .

[6] *See also NLRB v. International Bhd. of Elec. Workers*, 308 U.S. 413 (1940); *NLRB v. Falk Corp.*, 308 U.S. 453 (1940).

However, while it is clear that this Court generally has circumscribed the jurisdiction of the Courts of Appeals to review orders of the Board in cases involving directed *first* elections,[7] it is likewise clear that neither the Court nor Congress had in mind the type of situation presented in the instant matter, wherein: (1) a first election *already* was held; (2) *identical* charges and objections were filed; (3) the Board found merit to certain of the charges and objections and, *as part of its remedial order*, directed a *second* election; and (4) review was sought in the Courts of Appeals from the Board's order in the consolidated cases.

Petitioner submits that the Sixth Circuit Court of Appeals' holding that it lacked jurisdiction to review the Board's remedial order directing a *second* election in this case misconstrues and misapplies the teachings of this Court set forth in the above-cited cases. There is a distinct and fundamental difference between cases in which the Board has exercised the authority granted it by Congress to direct an *initial* election among employees in an appropriate unit; and one wherein (as here) an election *already* was conducted, unfair labor practice and objection allegations were consolidated for trial, and based upon identical unfair labor practice and objection facts, the Board ordered a second election. In the former situation there are substantial practical and statutory reasons for the judiciary *not* to interfere with the

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[7]This Court has recognized exceptions to the policy of non-reviewability of Board orders directing *initial* elections in two circumstances. First, where expeditious, direct review is warranted due to "the presence of public questions particularly high in the scale of our national interest because of their international complexion." *McCulloch v. Sociedad Nacional de Marineros de Honduras*, 372 U.S. 10, 17 (1963). Second, direct review is available where the Board has acted "in excess of its delegated powers and contrary to a specific prohibition in the Act." *Leedom v. Kyne*, 358 U.S. 184, 188 (1957).

Petitioner does not contend that either of these recognized exceptions are applicable to the case at bar. Indeed, such exceptions are irrelevant because, as with the other cases heretofore decided by this Court, they concerned Board orders involving first elections, and not orders directing *second* elections as part of the Board's remedy.

Board's order. In the latter, however, practical and statutory considerations (discussed *infra*) compel the conclusion that the Courts of Appeals can, and *should*, intervene.

In short, the Sixth Circuit's (as well as other Courts of Appeals')[8] mechanical reliance on this Court's precedent in *American Federation of Labor, supra; Electrical Workers, supra; and Falk, supra,* is erroneous. The issue of whether the Courts of Appeals have jurisdiction to review the Board's remedial orders directing second elections in the circumstances presented herein is a recurring one. Additionally, this matter is one of unusual practical importance inasmuch as the rulings of the various Courts of Appeals on this issue merely serve to prolong Board representational proceedings, frustrate the purposes of the Act, and result in a waste of judicial resources. Furthermore, as discussed below, an increasing number of Courts of Appeals judges recently have begun to recognize the fallacy of the approach heretofore taken, and have voiced both legal and practical arguments in support of their positions *identical* to those advanced by Petitioner herein.

B. *Prior Decisions Of This Court Support The Result Urged By Petitioner*

As stated, this Court's prior decisions on the scope of appellate review of Board election decisions do not address the instant situation—a directed second election as part of the Board's remedy in a combined unfair labor practice/objections case. Nevertheless, this Court's precedent indicates that the Sixth Circuit's decision was erroneous.

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[8] *See, e.g., TRW-United Greenfield Div. v. NLRB,* 637 F.2d 410, 415 n. 5 (5th Cir. 1981); *NLRB v. Intertherm, Inc.,* 596 F.2d 267, 278 (8th Cir. 1979); *NLRB v. Monroe Tube Co.,* 545 F.2d 1320, 1329 (2d Cir. 1976); *NLRB v. Auto Crane Co.,* 536 F.2d 310, 311 (10th Cir. 1976); *NLRB v. Styletek, Div. of Pandel-Bradford, Inc.,* 520 F.2d 275, 277 n. 2 (1st Cir. 1975); *Daniel Const. Co. v. NLRB,* 341 F.2d 805, 809-10 (4th Cir.), *cert. denied,* 382 U.S. 831 (1965).

Thus, in *American Federation of Labor v. NLRB, supra,* the issue was whether the Board's certification of a union as bargaining representative was directly reviewable by a Court of Appeals in the absence of any unfair labor practice proceeding that would vest it with jurisdiction under §10(f) of the Act. As stated above, the Court answered that question in the negative. However, in analyzing the legislative history of the provisions of the Act that provide for appellate review, the Court observed that "the committee reports were emphatic in their declaration that the provisions of the bill for court review did not extend to proceedings under §9 *except as incidental to review of an order restraining an unfair labor practice* under §10." 308 U.S. at 410 (emphasis supplied). In the instant case, there can be no question that the Board's order directing a second election was but "incidental" to its decision concerning unfair labor practices. Indeed, the *sole* basis for the Board's order were its unfair labor practice findings.

Moreover, in *NLRB v. Falk Corp., supra,* the Court held that:

> There can be no court review under §9(d) until the Board issues an order and requires the employer *to do something predicated upon the result of the election.* 308 U.S. at 459 (emphasis supplied).

Here, the Board *has* issued an order, part of which was the direction of a second election. Thus, the Company *was* ordered to "do something," i.e., to submit to a directed second election. Further, such clearly was "predicated upon the result of the [first] election."

Similarly, in *Boire v. Greyhound,* 376 U.S. 473 (1964), the Court held that the U.S. District Courts lacked power to enjoin the Board's direction of a first election. In that case, the Court reaffirmed its ruling in *American Federation of Labor, supra,* that Board orders in certification proceedings, standing alone, normally are not directly reviewable. The Court observed, however, that such decisions are "normally reviewable only where the dispute concerning the correctness of the certification

eventuates in a finding by the Board that an unfair labor practice has been committed. . . ." 376 U.S. at 477.[9] Clearly, in the case at bar the Board's order of a second election is inextricably interwoven with its unfair labor practice findings. Hence, this case falls within the scope of review of the Courts of Appeals, as contemplated by this Court in *Boire v. Greyhound, supra*.

C. *There Is Currently Great Debate, Dissention, And Confusion Among The Courts Of Appeals On The Issue Presented Herein*

Until very recently, the Ninth Circuit Court of Appeals had held that the courts possessed jurisdiction to review Board orders directing a second election when, as in the case at bar, those orders were based entirely on unfair labor practice findings that also were on review. *Raley's, Inc. v. NLRB*, 703 F.2d 410, 415-16 (9th Cir. 1983).[10] Later, the Ninth Circuit granted *en banc* review to the decision of its panel in *Raley's, Inc.* and, in an opinion decided on February 13, 1984, reversed the panel's decision in that case. *Raley's Inc. v. NLRB*, 725 F.2d 1204 (9th Cir. 1984).

However, it is important to note that in its *en banc* opinion the court *acknowledged* that there was "practical sense" in the panel's holding "that when an order requiring a new election is based upon the alleged unfair labor practice under review, judicial economy would perhaps be better served by a concurrent review of the election order." 725 F.2d at 1206. Yet, the court felt

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[9]In *Boire v. Greyhound*, the Court added, *by way of example only*, that one such unfair labor practice could be where "an employer refuses to bargain with a certified representative on the ground that the election was held in an inappropriate unit." 376 U.S. at 477. It is significant that (as with other Circuits) the Sixth Circuit Court of Appeals in the instant case ruled that the *only* time a Board election order can be reviewed is when such ultimately results in an employer's refusal to bargain unfair labor practice. *Boire* does not support this limited interpretation.

[10]*See also, Anja Engineering Corp. v. NLRB*, 685 F.2d 292, 297 (9th Cir. 1982); *Summa Corp. v. NLRB*, 625 F.2d 293, 296 (9th Cir. 1980); *NLRB v. General Tel. Directory Co.*, 602 F.2d 912, 920 (9th Cir. 1979).

constrained by this Court's decision in *Boire v. Greyhound, supra,* and ruled that it lacked jurisdiction to review the Board's order directing a second election. *Id.* Significantly, nowhere in the Ninth Circuit's *en banc* opinion in *Raley's, Inc.* did the court come to grips with the fact that (as discussed above) in *Boire v. Greyhound, supra; American Federation of Labor v. NLRB, supra,* and other similar cases decided by this Court, the question at issue was only that of the Courts of Appeals' jurisdiction to review an *initial* order of the Board directing an election. This Court has *never* decided the precise issue presented herein, and Petitioner submits that it should do so now and agree with the Ninth Circuit that "practical sense" compels the result reached previously by that court.

An additional example of the confusion extant among the Circuits concerning their jurisdictional authority to review Board remedial orders directing second elections is presented by the Sixth Circuit, from which a writ of certiorari is sought in the instant petition. Thus, in *Maremont Corp. v. NLRB,* 666 F.2d 1037 (6th Cir. 1981), the court was presented with a case identical to this one, i.e., the Board had consolidated unfair labor practice charges and election objection allegations (which were based upon identical facts), and had issued a Decision and Order regarding the unfair labor practices combined with a Direction of Second Election. It is clear that the *Maremont* court concluded that it had jurisdiction to review *the Board's order directing a second election* along with its unfair labor practice order inasmuch as it held:

> We are of the opinion that the order of the Board setting aside the election is not supported by sufficient evidence and is clearly erroneous. It is therefore ordered that said order of the Board be set aside and held for naught and that said election conducted be held to be valid. *Id.* at 1037.[11]

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[11]In the decision which gave rise to the instant petition, the Sixth Circuit recognized that its ruling was contrary to that in *Maremont.* However, the court did not overrule its previous decision. Rather, it merely opined that *Maremont*

(footnote continued on next page)

Finally, Petitioner submits that the most scholarly and cogent discussion of this issue (and the error heretofore committed by the Courts of Appeals) appears in *Graham Architectural Products Corp. v. NLRB*, 697 F.2d 534 (3d Cir. 1983). There, the court's majority conceded that "considerations of efficiency and judicial economy seem to suggest that we review the election order" as well as the Board's unfair labor practice findings. However, the majority declined to review the Board's election order in conjunction with its unfair labor practice decision "issued in a consolidated proceeding and involving common facts." *Id.* at 543.

Circuit Judge Garth dissented because "neither the National Labor Relations Act, nor the authorities interpreting that Act, establish that a Court of Appeals has no jurisdiction in a situation such as this one." *Id.* at 544. As found by Judge Garth, the provisions of the Act:

> do not, by their terms, expressly grant or withhold Court of Appeals jurisdiction over a Board order for a *second* election. Indeed, [the provisions of the Act] do not even address this subject, any more than they expressly address Court of Appeals jurisdiction to review an order which directs, or results from, an initial representation election. *Id.*

After discussing the established rule of law that Board orders directing *initial* elections are not reviewable by the Courts of Appeals, Judge Garth observed:

> Yet, it is undeniable that the Act on its face does not expressly limit section 160(f) ("final order") review of election orders to situations where an order based on Section 158(a)(5) (refusal to bargain) has issued. *Id.* at 545.

In concluding that a §8(a)(5) refusal to bargain situation is not the only manner in which review of the Board's order directing a

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[11](continued)
"did not recite any legal authority or espouse any reasoning in support of its decision." App. 11a.

second election can come before the courts, Judge Garth stated:

> I suggest that this cannot be so for three reasons. First, that portion of the Board's order directing a new election constitutes no more than an incidental and remedial aspect of the Board's cease and desist order predicated on unfair labor practices, which we have not sustained. . . .
>
> Second, neither the statute nor the cases glossing the statute, require that another and needless second election must now be held in order to vest this court with jurisdiction to set aside an "election order" which should never have been issued in the first place.
>
> Third, not only do I regard the "new election" order as part and parcel of the Board's "final" cease and desist order, so that both are reviewable by us as a "final order," but I also regard reviewability at this time to be required by sheer logic, reason and common sense. *Id.* at 546.

In sum, Judge Garth found that:

> treating or regarding the Board's order for a new election as a separate and discrete order which must carry the weight of finality of and by itself in this context, exalts form over substance. *Id.* at 547.

Subsequent to the decision of the panel in *Graham Architectural Products, supra,* the petitioner sought a rehearing and hearing *en banc.* Although a majority of the Third Circuit denied the petitioner's hearing *en banc* request, it is significant that Circuit Judge Adams, joined by Circuit Judges Hunter and Weis, issued a statement supportive of Judge Garth's earlier dissent in that case. In *Graham Architectural Products Corp. v. NLRB,* 706 F.2d 441 (3d Cir. 1983), Judge Adams noted that the court's panel had refused enforcement to four of the Board's six unfair labor practice findings. He observed that:

> Therefore, that election should not have been set aside. And this Court, on review of the second election, will almost

assuredly overturn the second election as improperly authorized inasmuch as the first election was valid. *Id.* at 442.

Judge Adams found further:

> The appeal here is not taken under an exception to the final order doctrine, but rather under the final order doctrine itself. The Board has issued a final order resolving these unfair labor practice charges, and the fact that a portion of the remedy imposed in that single order is a re-run election does not change the plain language of the statute which gives a court of appeals authority to deny enforcement "in whole" to the order if the court believes it necessary to do so. *Id.* at 443.

Judge Adams concluded that:

> Cases such as *Boire v. Greyhound,* 376 U.S. 473, 84 S.Ct. 894, 11 L.Ed.2d 849 (1964) and *American Federation of Labor v. National Labor Relations Board,* 308 U.S. 401, 60 S.Ct. 300, 84 L.Ed. 347 (1940), were decided with concern for the delay which pre-election appeals would cause; they did not address the question whether a court having proper jurisdiction over the issues underlying a re-election order should refuse to decide the question whether the second election should be held. . . . Having once placed a judicial gloss on a statute, we must always be careful to examine the reasons underlying the first decision in order to make certain that we are justified before we apply the second layer of varnish to that legislative act. When the reason for a particular interpretation has ended, so must the interpretation. By relying on prior decisions that may be based on policy concerns not present in the case now before the court, the majority appears to be elevating form over substance, and relying on a rule even though the rationale for that rule does not apply in the present situation. Justice Cardozo eloquently reminded us many years ago that when concepts are "developed with merciless disregard of consequences to

the limit of their logic," they become "tyrants rather than servants" of those who employ them. *The Paradoxes of Legal Science*, p. 61. *Id.* at 443-44.

Accordingly, four judges of the Third Circuit Court of Appeals are fully supportive of Petitioner's position herein, i.e., there is nothing in the Act or prior decisions of this Court which prevents the Courts of Appeals from asserting jurisdiction over Board remedial orders directing *second* elections, as opposed to orders of the Board directing an *initial* election. In the case of an initial election, there are substantial reasons for the Courts of Appeals *not* to assert jurisdiction. Otherwise, substantial delays in the representation process would ensue, which could be injurious to employees' rights to self-organization. In the case of a *second* election, however, which (as here) is directed by the Board as part of its remedial order in conjunction with its unfair labor practice findings, such considerations do not exist.

Thus, using the instant case as an example, the first election was held on October 6, 1978, five and one-half years ago. *Had* the Sixth Circuit Court of Appeals asserted jurisdiction over the Board's Direction of Second Election, it might have concluded that, although the Board's unfair labor practice findings were supported by substantial evidence, such were not serious enough to taint the results of the first election. By its refusal to review the Board's remedial second election order, the court has condemned the Company and its employees to undergo another, possibly meaningless, election; the results of which ultimately may be overturned by the Court of Appeals after *additional* years of delay and litigation expense.

Such a result only serves to *increase* delays in the Board's representational process, and causes the Courts of Appeals needlessly to expend their resources in evaluating *twice* what could have been resolved in a *single* proceeding.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted, and the matter should be remanded to the Court of Appeals for the Sixth Circuit with instructions to evaluate whether substantial evidence on the record as a whole supports the Board's direction of second election.

Respectfully submitted,

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CERTIFICATE OF SERVICE

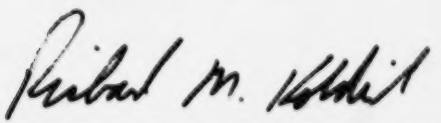
I, Richard M. Kobdish, do hereby certify that on April 6, 1984, three (3) true and correct copies of the foregoing Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit, as well as three (3) true and correct copies of the accompanying Appendix, were deposited in the United States Post Office with first class postage prepaid and properly addressed to the following parties to this action and others required to be served:

WILLIAM L. LUBBERS
General Counsel
National Labor Relations Board
1717 Pennsylvania Avenue, N.W.
Washington, D.C. 20570

SOLICITOR GENERAL
Department of Justice
Washington, D.C. 20530

I also certify that all parties required to be served have been served, and that forty (40) copies of said Petition, and forty (40) copies of said Appendix, were served on the same day and in the same manner on:

ALEXANDER L. STEVAS, Clerk
Office of the Clerk
United States Supreme Court
1 First Street, N.E.
Washington, D.C. 20543



RICHARD M. KOBDISH